Supreme Court, U.
FILED
MAR 21 1990
JOSEPH F. SPANIOL,
CLERK

(5)

No. 89-1273

In the
Supreme Court of the United States
October Term, 1989

INTERNATIONAL LOGISTICS GROUP, LTD.,
Petitioner,

v.

CHRYSLER CORPORATION,
Respondent.

ON PETITION FOR
WRIT OF CERTIORARI TO
THE UNITED STATES
COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Reply of Petitioner to Brief and Supplemental Brief of Respondent in Opposition to Petition for Certiorari

ROBINS, KAPLAN, MILLER & CIRESI
James R. Safley
Counsel of Record
E. Anne McKinsey
1800 International Centre
900 Second Avenue South
Minneapolis, Minnesota 55402
(612) 349-8500
Attorneys for Petitioner

1990 — Bachman Legal Printing, 835 Second Ave. So., Mpls., MN 55402 — (612) 339-9518 ■
FAX 612-337-8053

14 pp

TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

Introduction 2

Argument 2

I

Respondent's briefs demonstrate that the lower court's ruling is contrary to this Court's decisions that coerced agreements satisfy the contract, combination or conspiracy requirement of Section 1 of the Sherman Act 2

II

Respondent's briefs do not support the lower court's rigid insistence on "relevant market" proof in determining the anticompetitive effect of a bid allocation scheme in a Section 1 case 5

III

Respondent has provided no authority to support the lower court's complete disregard of a jury's findings in a rule of reason case 7

Conclusion 10

TABLE OF AUTHORITIES

Cases: **Page**

Ad-Vantage Telephone Directory Consultants, Inc. v. GTE Directories Corp., 849 F.2d 1336 (11th Cir. 1987) 8

Albrecht v. Herald Co., 390 U.S. 145 (1968) 3, 4

Black Gold, Ltd. v. Rockwool Industries, Inc., 729 F.2d 676 (10th Cir. 1984) aff'd on reh'g, 732 F.2d 779 (10th Cir. 1984), *cert. denied,* 469 U.S. 854 (1984) 4

Brown Shoe Co. v. United States, 370 U.S. 294 (1962) ... 7

Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 108 S. Ct. 1515 (1988) 4, 5

Cackling Acres, Inc. v. Olson Farms, Inc., 541 F.2d 242 (10th Cir. 1976), *cert. denied,* 429 U.S. 1122 (1977) 8

Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962) 3

FTC v. Superior Court Trial Lawyers Association U.S. 110 S.Ct. 768 (1990) 5

International Boxing Club v. United States, 358 U.S. 242 (1958) 6

Interphoto Corp. v. Minolta Corp., 295 F. Supp. 711 (S.D.N.Y. 1979), aff'd, 417 F.2d 621 (2nd Cir. 1969) 4

Lessing v. Tidewater Oil Co., 327 F.2d 459 (9th Cir. 1964), *cert. denied,* 377 U.S. 993 (1964) 4

Martin B. Glauser Dodge Co. v. Chrysler Corp., 570 F.2d 72 (3rd Cir. 1977), *cert. denied,* 436 U.S. 913 (1978) 8

Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984) 3, 8

NCAA v. Board of Regents of University of Oklahoma, 468 U.S. 85 (1984) 6

Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968) 3

Syufy Enterprises v. American Multicinema, Inc., 783 F.2d 878 (9th Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987) 8

United States v. Parke, Davis & Co., 362 U.S. 29 (1960) 3, 5

Yentsch v. Texaco, Inc., 630 F.2d 46 (2nd Cir. 1980) 4

No. 89-1273

In the

Supreme Court of the United States

October Term, 1989

INTERNATIONAL LOGISTICS GROUP, LTD.,
Petitioner,

v.

CHRYSLER CORPORATION,
Respondent.

ON PETITION FOR
WRIT OF CERTIORARI TO
THE UNITED STATES
COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Reply of Petitioner to Brief and Supplemental Brief of Respondent in Opposition to Petition for Certiorari

Petitioner International Logistics Group, Ltd. (ILG), respectfully submits the following reply to the brief and supplemental brief filed on behalf of respondent Chrysler Corporation (Chrysler) in opposing ILG's petition for writ of certiorari.

INTRODUCTION

This reply brief is submitted to correct critical errors made by Chrysler, and to clarify, to the extent necessary, the compelling reasons why this Court should grant certiorari to review the decisions below. The importance of the issues raised is underscored by the 20 *Amici* States, whose brief in support of ILG's petition elucidates the reasons why the decision of the Court of Appeals for the Sixth Circuit will insulate bid allocations and effectively undermine antitrust enforcement.

ARGUMENT

I

RESPONDENT'S BRIEFS DEMONSTRATE THAT THE LOWER COURT'S RULING IS CONTRARY TO THIS COURT'S DECISIONS THAT COERCED AGREEMENTS SATISFY THE CONTRACT, COMBINATION OR CONSPIRACY REQUIREMENT OF SECTION 1 OF THE SHERMAN ACT.

The trial record (cited in ILG's statement of facts in its petition) establishes the following: ILG and other distributors had for many years actively sold Chrysler parts to the government; beginning in 1982, Chrysler began to impose restraints on distributor bids to the government; these restraints prevented distributors from competing against Chrysler for the larger government contracts (in excess of $10,000); these were not "export restraints," but were applied to all Chrysler parts customers who sold to the government; and the purpose of these restraints was to eliminate distributor competition and allow Chrysler to sell parts to the government at inflated prices. Further, it is undisputed that Chrysler went beyond the simple announcement of policy and subjected ILG and other distributors to coercion, threats and intimidation to withdraw competing bids and refrain

from submitting bids against Chrysler on government contracts.[1]

Chrysler argues that ILG could not prove a contract, combination or conspiracy because ILG refused to go along with the bid allocation scheme (Chrysler's Brief at 7-8 & n. 7). However, a conspiracy need not be 100% successful to be actionable under Section 1 of the Sherman Act. As demonstrated in ILG's petition, Chrysler was able to secure the agreement of other distributors to withdraw bids and refrain from competing against Chrysler. It has long been established that the termination of a recalcitrant dealer or distributor done pursuant to or in furtherance of a conspiracy may violate Section 1.

It is clear that the lower court ruling would abolish the coerced conspiracy doctrine approved in *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 142 (1968), and *Albrecht v. Herald Co.*, 390 U.S. 145, 160 (1968). In *Albrecht*, this Court explained that the noncomplying plaintiff "might successfully have claimed that respondent had combined with other carriers because the firmly enforced price policy applied to all carriers, most of whom acquiesced in it." *Id.* at 150, n.6.

Chrysler suggests that the holding in *Albrecht* is simply *dicta* and expresses serious doubt whether the coerced conspiracy doctrine survived *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984) (Chrysler's Brief at 7 n. 6). However, this Court's holding in *Monsanto* affirmed a verdict for a dealer that would not go along with the supplier. Thus, *Monsanto* does not require that a dealer agree to the supplier's restrictions in order to challenge a conspiracy. Similarly, in *United States v. Parke, Davis & Co.*, 362 U.S. 29, 45-46 (1960), the termination of a retailer that continued to discount prices in contravention of the

---

[1] Although the parties' respective factual statements may diverge on some points, the facts and inferences documented in the record in support of ILG's position must be accepted in light of the lower court's affirmance of a directed verdict ruling. *See Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962).

supplier's minimum price rules was evidence of an illegal combination, where retailers that went along with program were not terminated.[2]

Chrysler's argument would lead to the anomalous result that only a distributor that went along with the bid allocation scheme, and not one that refused to comply and was terminated, could bring an action under Section 1. Such a result is surely not intended by the antitrust laws and would contravene public policy as it would encourage parties to go along with anticompetitive demands.

Chrysler also argues that a coerced conspiracy cannot result from a vertical, non-price restraint imposed by a supplier upon its customers (Chrysler's Brief at 8-9). However, no case decided by this Court has ever applied a different standard for proof of a contract, combination or conspiracy based on the nature of the restraint. In *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 108 S. Ct. 1515 (1988), this Court simply held that "a vertical restraint is not illegal *per se* unless it includes some agreement on price or price levels." 108 S. Ct. at 1525. Further, this Court reaffirmed both *Albrecht v. Herald Co.*

---

[2] Other circuits have followed this approach. *See Black Gold, Ltd. v. Rockwood Industries, Inc.*, 729 F.2d 676, 686 (10th Cir. 1984), *aff'd on reh'g*, 732 F.2d 779 (10th Cir. 1984), *cert. denied*, 469 U.S. 854 (1984) (termination of plaintiff used by defendant to require its other customers to buy both of defendant's products in furtherance of its illegal tying arrangement); *Yentsch v. Texaco, Inc.*, 630 F.2d 46, 55 (2nd Cir. 1980) (termination of plaintiff for its failure to fully comply with the pricing demands of the defendant constituted a coerced agreement); *Lessing v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir. 1964), *cert. denied*, 377 U.S. 993 (1964) (defendant supplier secured the dealer's adherence to fix prices with threats to terminate and termination of dealers' leases and contracts when dealers did not comply with the price suggestions); *Interphoto Corp. v. Minolta Corp.*, 295 F. Supp. 711, 722-23 (S.D.N.Y. 1969), *aff'd*, 417 F.2d 621 (2nd Cir. 1969) (termination of distributor who refused to adhere to prices in the face of the manufacturer's affirmative efforts to secure compliance was time-honored method of furthering a conspiracy, which manifestly advanced defendant's resale price maintenance scheme and fortified the territorial restrictions with the other distributors).

and *Parke, Davis. Id.* Thus, whether a particular restraint is a "non-price restraint" is not a relevant issue to consider in determining whether a contract, combination or conspiracy has been established by the plaintiff in a Section 1 case.[3]

It was not the province of the lower court to accept Chrysler's argument that the prior holdings of this Court were mere *dictum* which should no longer be followed. Further, as the *Amici* States explain, the lower court's holding — that an agreement is really not an agreement whenever the supplier could achieve the same result unilaterally — is not only without precedent, but would potentially immunize all vertical restraints, including resale price maintenance.

II

RESPONDENT'S BRIEFS DO NOT SUPPORT THE LOWER COURT'S RIGID INSISTENCE ON "RELEVANT MARKET" PROOF IN DETERMINING THE ANTICOMPETITIVE EFFECT OF A BID ALLOCATION SCHEME IN A SECTION 1 CASE.

A. Chrysler has cited no legal authority to support the proposition that a supplier's bid allocation program is not illegal unless the plaintiff first establishes a relevant market. When the supplier and its distributors are in direct competition, a bid allocation arrangement has no redeeming value and should be condemned as illegal *per se*. ILG joins with the *Amici* States in asserting that this conclusion is mandated by this Court's recent holding in *FTC v. Superior Court Trial Lawyers Association*, 110 S.Ct. 768 (1990).

Chrysler's supplemental brief argues that ILG and Chrysler were not "competitors." This rests on the notion that ILG and other distributors were not allowed to sell to the government; *i.e.*, that "Chrysler did not permit the

---

[3] ILG does not agree that the restraints were in fact "non-price" restraints, since the purpose of Chrysler's government bid allocation scheme was to eliminate distributor price competition and permit Chrysler to charge higher prices.

resale of its parts to the government" (Chrysler Supp. Brief at 3). However, since it is undisputed that ILG did not accept Chrysler's demands to refrain from selling to the government, ILG remained a competitor (and was characterized as such in Chrysler documents). Further, the fact that other distributors did accede to Chrysler's policy does not signify that they were not competitors for purposes of antitrust analysis. Indeed, the very essence of a bid allocation scheme is that the parties reach some form of understanding that they will not compete with one another.[4]

The *Amici* States were absolutely correct in characterizing the restraints as a bid allocation, which is *per se* illegal, and expressing alarm at the holdings of the lower court which immunized that scheme as a matter of law.

B. Even if a "relevant market" had to be proved as a part of ILG's Section 1 claim, the record demonstrates that the government was at least a relevant "submarket" to consider. *International Boxing Club v. United States*, 358 U.S. 242 (1958), and *NCAA v. Board of Regents of University of Okla.*, 468 U.S. 85 (1984), both cited by Chrysler, stand for the proposition that the effect on competition in a Section 1 case can be established with a "submarket" type of analysis. Contrary to Chrysler's assertions, these cases actually support ILG's position that, even if a relevant market must be proved, the sale of Chrysler parts to the government was

---

[4] The trial record shows that ILG and other distributors were authorized to sell to the government until Chrysler decided that distributor competition was eroding its profit margins (ILG Petition at 3-7). A Chrysler report complained that "several organizations within Chrysler as well as some of their customers compete for federal government business" (P. Ex. 144). A subsequent Chrysler letter "accuses Interparts customers of pursuing government bids at prices competitive to Parts Division quotes" (P. Ex. 223).

In direct response to this competition Chrysler imposed the government bid allocation scheme. When ILG refused to go along with the scheme and continued to bid below Chrysler, it was terminated. On the other hand, those distributors such as UWD and Jamco who either withdrew competing bids at Chrysler's insistence or agreed to clear bids in advance with Chrysler could continue to act as Chrysler parts distributors. (ILG Petition at 6-7).

an appropriate submarket to consider for purposes of Section 1 analysis.

This Court's opinion in *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), is far more flexible than the Sixth Circuit's ruling. This Court held:

> The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and the substitutes for it. However, within this broad market, well-defined submarkets may exist for antitrust purposes. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of a submarket as a separate economic entity, the product's peculiar characteristics or uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

370 U.S. at 325.

In this case, ILG proved at trial that Chrysler and everyone else regarded the government as unique, that the restraints were directed toward the government, and that sales to the government of parts suitable for use in Chrysler vehicles met all of the *Brown Shoe* submarket criteria (ILG Petition at 7-8). The lower court required ILG to establish a relevant market to far more exacting standards than this Court has ever applied in a Section 1 case.

III

RESPONDENT HAS PROVIDED NO AUTHORITY TO SUPPORT THE LOWER COURT'S COMPLETE DISREGARD OF A JURY'S FINDINGS IN A RULE OF REASON CASE.

The lower court's decision to affirm a directed verdict, notwithstanding contrary jury findings, also has raised a significant issue worthy of this Court's consideration. In an antitrust conspiracy case, where facts are disputed and demeanor of the witnesses is critical, the Court has recognized that the jury has a very important role. *See, e.g.*,

Monsanto, 465 U.S. at 768 n.14 (a case is properly submitted to the jury where there is a sharp conflict in evidence). In this case, it is particularly disturbing that no reason whatsoever was given by the Sixth Circuit for disregarding the jury's answers to special interrogatories which were returned directly adverse to Chrysler.

Chrysler misapprehends the issue which ILG seeks to raise before this Court. Although there is a serious question as to whether the trial court had authority to direct a verdict during the course of the jury's deliberations (*see* Fed. R. Civ. P. 50 (a)), ILG does not seek review of "the lower court's decision to permit the jury to continue its deliberations after granting Chrysler's motion for directed verdict" (Chrysler's brief at 6 n. 5). Instead, ILG appeals from the refusal of the trial court and Sixth Circuit to grant ILG's motion to vacate the directed verdict and to enter partial judgment on the answers to special interrogatories.

The "rule of reason" inquiry framed in this Court's recent decisions raises inherently factual questions which should be resolved by the jury. Here, the jury acted in a responsible manner, and took almost five days to deliberate. The jury was fully qualified to unanimously decide (as it did) that Chrysler engaged in a conspiracy with its customers, that the government was a relevant market, and that the conspiracy was an unreasonable restraint of trade in the relevant market. The rejection of the jury's answers by the Sixth Circuit is in clear conflict with other circuits which do not disturb jury verdicts absent compelling and fully articulated reasons.[5]

[5] Chrysler alleges that the cases cited by ILG concerning the determination of relevant market as a question of fact for the jury all sustain the grant of a directed verdict or judgment notwithstanding the verdict because of insufficient proof of relevant market (Chrysler's Brief at 13 n.10). Chrysler's reading of those cases is wrong. *See Ad-Vantage Telephone Directory Consultants, Inc. v. GTE Directories Corp.*, 849 F.2d 1336, 1341 (11th Cir. 1987); *Syufy Enterprises v. American Multicinema, Inc.*, 783 F.2d 878, 882-83 (9th Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987); *Martin B. Glauser Dodge Co. v. Chrysler Corp.*, 570 F.2d 72, 81-82 (3rd Cir. 1977), *cert. denied*, 436 U.S. 913 (1978); *Cackling Acres, Inc. v. Olson Farms, Inc.*, 541 F.2d 242, 245-46 (10th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977).

Chrysler also argues that submission of this issue for review is frivolous, because the jury could not unanimously resolve the question of whether Chrysler's restraints in the government market caused injury to ILG. (The jury split five to one in favor of plaintiff on this last interrogatory.) However, this result is understandable in a bifurcated trial in which ILG could not present damage proof. In the event this Court should grant certiorari in this case and reverse the Sixth Circuit, it would further the interests of justice and judicial efficiency to enter partial judgment on the interrogatories answered unanimously and not require the parties to relitigate those issues which have been already resolved by the previous fact finder.[6]

---

[6] Chrysler raises a number of issues at Part III of its Brief which were not addressed by the Sixth Circuit, but which Chrysler characterizes as "valid reasons" why the result below would not change even if ILG was successful in this appeal.

Chrysler's argument that its restrictions did not cause ILG any antitrust injury, since ILG could continue to obtain parts from "thousand of sources other than Chrysler itself" (Chrysler's brief at 4, 14), is belied by the record. After Chrysler terminated ILG, its business declined to 10% of its former volume (Tr. 717-18). Chrysler not only stopped directly supplying ILG, but also prohibited vendors from dealing with ILG (Tr. 683, P. Ex. 159, 337).

Chrysler also states that the government could obtain parts suitable for use in Chrysler vehicles from thousands of sources. However, the trial record shows that the government had unique requirements, that government contractors tended to be specialized, that relatively few companies bid on Chrysler compatible parts and that Chrysler Parts was one of the government's largest sources of noncompetitive supply (Tr. 387, 403-04, 493-95, 516-20, 674; P. Ex. 349).

Chrysler also refers to the "the presence of interbrand competition among automobile manufacturers" as a factor limiting any adverse effect on competition (Chrysler Brief at 17 n.15). Chrysler's own memorandum stated that rival automobile manufacturers, *e.g.*, Ford and GM, were not regarded as parts competitors (P. Ex. 184).

These and the other "valid reasons" raised by Chrysler are not supported by the trial record and should not divert attention from the serious issues raised in this petition.

CONCLUSION

For the reasons stated herein and in the brief of the *Amici* States, petitioner ILG respectfully urges this Court to grant certiorari in this case.

Dated: March 22, 1990

ROBINS, KAPLAN, MILLER & CIRESI

James R. Safley
Counsel of Record
E. Anne McKinsey

1800 International Centre
900 Second Avenue South
Minneapolis, MN 55402
(612) 349-8500